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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/757,706	01/14/2004	Michael Ernest	LIFE-F-P01A	4469
23653	7590	10/31/2005	EXAMINER	
FRANK G MORKUNAS 7750 DAGGET ST SUITE 203 SAN DIEGO, CA 92111			MELLER, MICHAEL V	
			ART UNIT	PAPER NUMBER
			1655	

DATE MAILED: 10/31/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/757,706

Applicant(s)

ERNEST, MICHAEL

Examiner

Michael V. Meller

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Election/Restrictions

This application contains claims directed to the following patentably distinct species of the claimed invention: the many different types of components in the protein mixture and enzyme pH adjustor formulation as claimed.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 1, 14, are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record

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showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

During a telephone conversation with Frank Morkunas on 10/12/2005 a provisional election was made with traverse to elect the invention of betaine HCl and pepsin as the two components in the enzyme pH adjustor formulation and whey protein isolate and soy protein isolate as the two components in the protein mixture. Affirmation of this election must be made by applicant in replying to this Office action. The other components in the protein mixture and the enzyme pH adjustor formulation are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 1-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over KR 2003025587 (abstract), Terry et al. (abstract, col. 1, lines 5-15, 50-end, col. 2, lines 1-10, the claims), KR 2002041162 (abstract) or JP 01132533 (abstract) taken with Craig et al. (col. 1, lines 1-10, col. 2, lines 1-50, col. 3, line 60-col. 4, line 15, col. 5, lines 15-30, the claims), Kamarei '650 (col. 5, line 50-col. 6, line 25) or Kamarei '425 (col. 5, line 40-col. 6, line 15).

KR 2003025587, Terry et al., KR 2002041162 and JP 01132533 all teach that pepsin and betaine HCl are known to be used in compositions to help improve digestion.

Craig et al. (col. 1, lines 1-10, col. 2, lines 1-50, col. 3, line 60-col. 4, line 15, col. 5, lines 15-30, the claims), Kamarei '650 (col. 5, line 50-col. 6, line 25) and Kamarei '425 (col. 5, line 40-col. 6, line 15) all teach that whey protein and soy protein are both also known to be used in compositions to help improve digestion.

It is well known that it is *prima facie* obvious to combine two or more ingredients each of which is taught by the prior art to be useful for the same purpose in order to form a third composition which is useful for the same purpose. The idea for combining them flows logically from their having been used individually in the prior art. *In re Sussman*, 1943 C.D. 518; *In re Pinten*, 459 F.2d 1053, 173 USPQ 801 (CCPA 1972); *In re Susi*, 58 CCPA 1074, 1079-80; 440 F.2d 442, 445; 169 USPQ 423, 426 (1971); *In re Crockett*, 47 CCPA 1018, 1020-21; 279 F.2d 274, 276-277; 126 USPQ 186, 188 (1960).

The reason or motivation to modify a reference may often suggest what the inventor has done, but for a different purpose or to solve a different problem. It is not necessary that the prior art suggest the combination to achieve the same advantage or result discovered by applicant. While there must be motivation to make the claimed invention, there is no requirement that the prior art provide the same reason as the applicant to make the claimed invention.

MPEP 2144 Sources of Rationale Supporting a Rejection Under 35 U.S.C. 103.
<http://www.uspto.gov/web/offices/pac/mpep/documents/2100_2144.htm>

Since the ingredients were all known to be used individually in the art for the same purpose, namely to improve digestion, then it would have been obvious to use them together in the same composition.

To use the specific amounts of the ingredients is simply the choice of the artisan in an effort to optimize the desired results and can be arrived at by routine experimentation.

The addition of a carrier which is a liquid substance which reads on water and a stabilizer which also could be water is obvious since water is included in the disclosed compositions in the various references as are many other carriers and stabilizers.

The soy protein and the whey protein were isolated from the native soybean and whey thus they are isolates.

Claims 1-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over KR 2003025587 (abstract), Terry et al. (abstract, col. 1, lines 5-15, 50-end, col. 2, lines 1-10, the claims), KR 2002041162 (abstract) or JP 01132533 (abstract).

KR 2003025587, Terry et al., KR 2002041162 and JP 01132533 all teach that pepsin and betaine HCl are known to be used in compositions to help improve digestion.

To use the specific amounts of the ingredients is simply the choice of the artisan in an effort to optimize the desired results and can be arrived at by routine experimentation.

The addition of a carrier which is a liquid substance which reads on water and a stabilizer which also could be water is obvious since water is included in the disclosed compositions in the various references as are many other carriers and stabilizers.

The soy protein and the whey protein were isolated from the native soybean and whey thus they are isolates.

The references show protein mixtures which are in the form of enzyme mixtures, see above citations.

Claims 14-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Craig et al. (col. 1, lines 1-10, col. 2, lines 1-50, col. 3, line 60-col. 4, line 15, col. 5, lines 15-30, the claims), Kamarei '650 (col. 5, line 50-col. 6, line 25) or Kamarei '425 (col. 5, line 40-col. 6, line 15).

Craig et al. (col. 1, lines 1-10, col. 2, lines 1-50, col. 3, line 60-col. 4, line 15, col. 5, lines 15-30, the claims), Kamarei '650 (col. 5, line 50-col. 6, line 25) and Kamarei

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'425 (col. 5, line 40-col. 6, line 15) all teach that whey protein and soy protein are both also known to be used in compositions to help improve digestion.

To use the specific amounts of the ingredients is simply the choice of the artisan in an effort to optimize the desired results and can be arrived at by routine experimentation.

The addition of a carrier which is a liquid substance which reads on water and a stabilizer which also could be water is obvious since water is included in the disclosed compositions in the various references as are many other carriers and stabilizers.

The soy protein and the whey protein were isolated from the native soybean and whey thus they are isolates.

The references show enzyme pH adjustor formulations which are in the form of acids, fats, carbohydrates, minerals, vitamins, antioxidants, etc, see above citations.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael V. Meller whose telephone number is 571-272-0967. The examiner can normally be reached on Monday thru Thursday: 9:30am-6:00pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Bruce Campell can be reached on 571-272-0974. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'MCM', followed by a long horizontal flourish line extending to the right.

Michael V. Meller
Primary Examiner
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MVM